Thus s 17 puts the manufacturer in an invidious position because it requires the court to invoke a rebuttable presumption from a mere label on the bottle that it is F & N who put the liquid in the bottle. Although Cheong Fatt sold it, F & N is also deemed from the label to have filled it. So F & N are to be liable to the same penalty, as if F & N had actually sold the bottle unless they rebut the prosecution's case.

Taking an overview of the matter, I hold that the gaps in the prosecution's evidence earlier referred to left F & N in a position where it could only do its best to show that all reasonable steps were taken to ascertain that the sale of the bottle would not constitute an offence against the Ordinance. That onus in law was one to show a defence on the balance of probabilities only. On the facts of this case, it was easily discharged.

I therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Shook Lin & Bok.*

Reported by *Yap Shao Sin*

Boonsom Boonyanit v Adorna Properties Sdn Bhd

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24-554-89
MOHAMED DZAIDDIN J
7 DECEMBER 1989 AND 27 DECEMBER 1989

Land Law — Registrar's caveat — Power of court to order registrar to enter registrar's caveat — Registrar of Titles not a party to proceedings — National Land Code 1965, ss 320(1) & 417(1)

Civil Procedure — Government proceedings — Injunction to restrain Registrar of Titles from registering any instrument of dealing in respect of land in dispute — Jurisdiction of court to make order — Government Proceedings Ordinance 1956, s 29(1) & (2) — Specific Relief Act 1950, s 54(d)

In this application, the respondent asks that the court set aside the order dated 14 July 1989 ('the said order') restraining the Registrar of Titles, Penang from registering any instrument of dealing and directing the entry of the registrar's caveat pursuant to s 320 of the National Land Code 1965 in respect of land situated at Bandar Tanjong Bungah ('the said land'). The order had been granted after considering the supporting affidavit of the applicant's solicitor, who alleged that she received information that someone had impersonated the applicant with forged documents to dispose of the said land. The two issues in this application are (i) whether the ex parte interlocutory mandatory injunction, and the registrar's caveat, was properly made; and (ii) whether in the present circumstances, the registrar's caveat should remain until the final determination of the dispute regarding the said land. A crucial question is whether the registrar's caveat was properly ordered, the Registrar of Titles never being a party to this originating summons.

[Upon the first hearing of the application, the learned judge held that the ex parte injunction order was properly made, as the application was one of great urgency and any further delay in filing the said application would have caused the applicant great hardship, on account of the alleged fraud committed or improper dealing concerning the transfer of the said land to the respondent. The learned judge also held that notwithstanding that the Registrar of Titles is not a party to this application, the court has power to order the registrar to enter the registrar's caveat under s 417(1) of the National Land Code 1965.

On 22 December 1989, the learned judge heard further arguments of counsel under O 56 r 2(2) of the Rules of the High Court 1980, wherein he held that the court has no jurisdiction to order an injunction against the Registrar of Titles, Penang, restraining him from registering any instrument of dealing in respect of the land in dispute in this summons. However, he affirmed his order that the registrar's caveat was necessary in order to prevent fraud or improper dealing.

For completeness, both written decisions of the learned judge are reported here.]

Held, dismissing the respondent's application in part:

(1) The court has no jurisdiction to order an injunction against the Registrar of Titles, Penang restraining him from registering any instrument of dealing in respect of the land in dispute, in view of s 29(2) of the Government Proceedings Ordinance 1956 read with s 54(d) of the Specific Relief Act 1950.

(2) Notwithstanding that the Registrar of Titles is not a party to this application, the court has power under s 417(1) of the Code to order the registrar to enter the registrar's caveat under s 320 to prevent fraud or improper dealing.

(3) Section 417 empowers the court to direct by order the registrar to do all such things as may be necessary to give effect to the court's order or judgment which included ordering the registrar to enter his registrar's caveat under s 320.

[Bahasa Malaysia summary

Dalam permohonan ini, penentang memohon mahkamah mengenepikan perintah bertarikh 14 Julai 1989 ('perintah itu') yang menghalang Pendaftar Hakmilik Tanah Pulau Pinang daripada mendaftar sebarang suratcara urusniaga dan mengarah kaveat pendaftar dimasukkan menurut s 320 Kanun Tanah Negara 1965 terhadap sebidang tanah di Bandar Tanjong Bungah ('tanah itu'). Perintah itu telah diberi setelah menimbang afidavit sokongan peguamcara pemohon yang mengatakan bahawa beliau menerima maklumat bahawa ada seorang telah menyamar dirinya sebagai pemohon dengan dokumen palsu untuk melupuskan tanah itu. Dua isu dalam permohonan ini adalah (i) adakah injunksi mandatori interlokutori dan kaveat pendaftar telah dibuat dengan wajarnya dan (ii) adakah dalam keadaan sedemikian, kaveat pendaftar seharusnya ditinggalkan sebagaimana keadaannya yang dahulu sehingga penyelesaian muktamad pertikaian mengenai tanah itu. Suatu soalan yang genting ialah adakah kaveat pendaftar diarah dengan wajarnya sedangkan Pendaftar Hakmilik Tanah tidak langsung dijadikan pihak dalam saman pemula ini.

[Selepas perbicaraan pertama permohonan ini, yang arif hakim memutuskan bahawa perintah ex parte itu telah dibuat dengan wajarnya kerana permohonan ini adalah sesuatu yang sangat perlu disegerakan dan sebarang kelambatan seterusnya dalam menfailkan permohonan ini boleh membawa kesusahan

yang besar kepada pemohon, atas tuduhan fraud yang dilakukan atau urusniaga yang tak wajar mengenai pindahmilik tanah itu kepada penentang.

Yang arif hakim juga memutuskan bahawa walaupun Pendaftar Hakmilik Tanah tidak dijadikan pihak kepada permohonan ini, namun demikian mahkamah masih mempunyai kuasa untuk mengarah pendaftar memasukkan kaveat pendaftar di bawah s 417(1) Kanun Tanah Negara 1965. Pada 22 Disember 1989, yang arif hakim mendengar hujah lanjut peguam di bawah A 56 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980, di mana beliau memutuskan bahawa mahkamah tidak mempunyai bidangkuasa mengarah suatu injunksi terhadap Pendaftar Hakmilik Tanah Pulau Pinang bagi menahan beliau daripada mendaftar sebarang suratcara urusniaga mengenai tanah yang dipertikaikan dalam saman ini. Walau bagaimanapun, hakim mengesahkan perintah beliau bahawa kaveat pendaftar adalah perlu untuk mencegah fraud atau urusniaga yang tak wajar. Untuk kesempurnaan, kedua-dua keputusan bertulis yang arif hakim dilaporkan di sini.]

Diputuskan, menolak sebahagian permohonan penentang:

(1) Mahkamah tidak mempunyai bidangkuasa mengarah injunksi terhadap Pendaftar Hakmilik Tanah Pulau Pinang bagi menghalangnya daripada mendaftar sebarang suratcara urusniaga mengenai tanah yang dipertikaikan itu, disebabkan oleh s 29(2) Ordinan Prosiding Kerajaan 1956 yang dibaca bersama dengan s 54 Akta Relif Spesifik 1950.

(2) Walaupun Pendaftar Hakmilik Tanah tidak dijadikan pihak dalam permohonan ini, mahkamah mempunyai kuasa di bawah s 417(1) Kanun itu bagi mengarah pendaftar memasukkan kaveat pendaftar di bawah s 320 supaya mencegah fraud atau urusniaga yang tak wajar.

(3) Seksyen 417 memberi kuasa kepada mahkamah untuk mengarah melalui perintahnya kepada pendaftar supaya melaksanakan segala perkara yang diperlukan bagi memberi kesan kepada perintah mahkamah atau hukuman yang termasuk mengarah pendaftar memasukkan kaveatnya di bawah s 320.]

[*Editorial Note*: The respondent's appeal to the Supreme Court vide Civil Appeal No 02-17-90 was heard on 29 August 1990 and the court (comprising Lee Hun Hoe CJ (Borneo), Mohamed Azmi and Jemuri Serjan SCJJ) dismissed the appeal.]

Cases referred to

1 *Registrar of Titles, Johore* v *Temenggong Securities Ltd* [1976] 2 MLJ 44 (refd)
2 *Seet Soh Ngoh* v *Venkateswara Sdn Bhd & Anor* [1976] 1 MLJ 242 (refd)
3 *Palaniappa Chettiar* v *Letchumanan Chettiar & Anor* [1982] 1 MLJ 232 (folld)
4 *Films Rover International Ltd* v *Cannon Film Sales Ltd* [1987] 1 WLR 670; [1986] 3 All ER 772 (refd)
5 *Law Kiat Long* v *Pardons Board, Johore* [1968] 2 MLJ 249 (folld)
6 *Sungei Biak Tin Mines* v *Saw Choo Theng & Anor* [1970] 2 MLJ 226 (refd)

Legislation referred to

Government Proceedings Ordinance 1956 s 29(1), (2)
National Land Code 1965 ss 320(1), 417(1)
Specific Relief Act 1950 s 54(d)

Gerard Chan Weng Yew for the applicant.
Ghazi Ishak for the respondent.

Cur Adv Vult

Mohamed Dzaiddin J (delivering judgment on 7 December 1989): This is an application on the part of the respondent asking the court to set aside the order dated 14 July 1989 ('the said order') restraining the Registrar of Titles, Penang from registering any instrument of dealing and directing the entry of the registrar's caveat pursuant to s 320 of the National Land Code 1965 in respect of land known as lots 3606 and 3607 Bandar Tanjong Bungah, mukim 18, Pulau Pinang ('the said land').

On 14 July 1989, upon an ex parte application by the applicant, I granted the above-mentioned order after considering the supporting affidavit of Ms Pamela Ong Siew Im, an advocate and solicitor, affirmed on even date. The applicant is a Thai national residing in Bangkok and is a widow of the late Saw Theng Hong who owned landed properties in Penang. According to Ms Ong, her firm has been solicitors for the applicant and her family in respect of their affairs in Penang and her eldest son, Bill Saw, who is personally known to Ms Ong, looks after the family interests in Penang. It seemed that on 12 July 1989, Ms Ong received information that someone had impersonated the applicant with forged documents to dispose of the said land and that solicitors had been appointed to act for both the purchaser and the purported vendor. She immediately telephoned Bill Saw in Bangkok who confirmed that his mother had not sold nor had instructed anyone to sell the said land. She was then instructed by Bill Saw to take necessary action to protect her mother's interest. She then tried to contact the lawyers concerned but was unsuccessful. However, she wrote letters to the respective solicitors informing about her client's instructions in the matter. In the meantime, she instructed her legal assistant to lodge a police report at the Beach Street Police Station concerning the purported fraud on the sale of the said land.

Subsequently, Ms Ong managed to speak to Mr Khor Keng Loon of Khor, Ong & Co, solicitors for the purported vendor, who informed her that the client had since discharged him and the purchase price of over $1m had been sent to another solicitor. Hence, in the circumstances and in order to prevent any further loss to the applicant, she filed an ex parte application praying for the relief in terms therein. Needless to say, acting on Ms Ong's affidavit, I accordingly granted the said order until further order.

On 9 September 1989, the present respondent, Adorna Properties Sdn Bhd, applied for and was given leave to intervene in these proceedings and on 30 November 1989 I heard arguments of counsel in respect of the present application.

Mr John Fong Wa Tan, the respondent's managing director, affirmed an affidavit dated 9 September 1989 supporting the present application. He deposed that the respondent company became the registered proprietor of

the said property on 24 May 1989 and he was advised that under s 340 National Land Code 1965 the respondent had a good title until proven otherwise. To date, however, there had been no action taken to challenge the respondent's title, presumably under any of the exceptions provided in s 340(2). As the respondent has commenced to develop the said land, the existence of the injunction order and the registrar's caveat would prevent the company from proceeding with its development project of the said land resulting in the respondent incurring considerable loss and damage. Further, Mr Fong deposed that para 3 of Ms Pamela Ong's affidavit is untrue because had she made enquiries at the Land Registry she would have discovered that the applicant was no longer the registered proprietor of the said land and that the respondent had become the registered proprietor even before the date when her ex parte application was filed. Secondly, he stated that Ms Ong's affidavit was defective because what was deposed therein was purely hearsay and the source of information was never disclosed.

Encik Ghazi (together with Encik CC Lim) for the respondent, in referring to Ms Ong's affidavit, submitted that Ms Ong had failed to make a full disclosure of the material fact that the applicant has ceased to be the registered proprietor of the said land at the time when the application was filed. Counsel also submitted that the order was not only a restraining order but mandatory in nature. Hence, on the basis of Ms Pamela Ong's affidavit, it should never be granted. However, the gravament of counsel's arguments are these. First, he contended that the restraining order should be set aside and the registrar's caveat be removed because the said order contravenes s 29(1) of the Government Proceedings Ordinance 1956. This section states as follows:

> In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that —
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

I should perhaps dispose of this argument by saying that Encik Ghazi has misread the operating sentence of this section, ie 'In any civil proceedings by or against the Government ...'. It is settled in the present proceedings that neither the government nor the Registrar of Titles, Penang is ever made a party in the proceedings.

Secondly, counsel contended that the application by the applicant was misconceived because the Registrar of Titles, Penang, was never made a party to the originating summons and that being the position he was not before this court when the order directing him to enter the registrar's caveat on the said land was made by the court. Further, the court could not order the registrar to register the said registrar's caveat because under s 320(1) of the National Land Code 1965, the registrar's function is quasi-judicial in nature which means that he could only act upon information available to him before exercising his discretion. In the instant case, as the registrar is not a party to the proceedings, he was not possessed of any or sufficient information when registering the said registrar's caveat. Encik Ghazi relied on the speech of Lord Diplock (delivering the judgment of the Privy Council) in *Registrar of Titles, Johore* v *Temenggong Securities Ltd*[1] at p 47 which states:

> Under these sections the registrar's functions in relation to registrar's caveats are not exclusively ministerial as they are in relation to the other kinds of caveats. They require the exercise of a discretion that is quasi-judicial in its nature. The prohibitory consequences resulting from the entry of a registrar's caveat impose what may be very damaging restrictions upon the private rights of the proprietor of the land. The registrar is not entitled to impose them unless they appear to him to be necessary or desirable for one or more of those purposes which upon the true construction of the section are specified in para (a) or (b) of s 320(1) or necessary or desirable to counteract such documentary error as is mentioned in para (c).
>
> In determining whether or not to exercise the power conferred upon him by the section, the registrar can only act upon such information as is available to him. This will consist of what is entered in the register itself or filed in the registry, together with such additional information as may have been supplied to him by whoever has requested him to exercise his power to enter a registrar's caveat.

In reply, Encik Gerard Chan, counsel for the applicant, submitted that the Registrar of Titles was merely directed by the court to register the registrar's caveat. Counsel relied on *Seet Soh Ngoh* v *Venkateswara Sdn Bhd & Anor*[2] which held that the court has power to direct the registrar to enter the registrar's caveat. In that case, Chang Min Tat J held that where the registrar was before the court on an allied matter he could be ordered to enter his caveat in circumstances where the status quo of title to land should be preserved pending the determination of the dispute by the court.

On the question whether the registrar is required to be made a party or be before the court first before the said order is good, counsel relied on the decision of Wong Kim

Fatt JC in *Palaniappa Chettiar* v *Letchumanan Chettiar & Anor*[3] who held that the High Court has power under s 417 of the Code to order the registrar to enter a registrar's caveat to prevent fraud or improper dealings in land whether or not the registrar is a party to the proceedings.

Finally, Encik Chan submitted that bearing in mind the situation and the circumstances of the matter faced by Ms Pamela Ong, the proper remedy available in order to prevent fraud or improper dealing of the said land and to protect the interest of the applicant was to apply for an entry of the registrar's caveat on the said land until the determination of the dispute. In this respect, counsel informed me that the applicant has filed a writ and a statement of claim against the defendant for a declaration concerning the purported transfer of the said land to the defendant. Hence, to protect the status quo the present registrar's caveat should remain until the disposal of the civil suit.

My approach to the respondent's application will be from two standpoints. First, to consider whether the ex parte injunction (which the respondent contended to be mandatory in nature) and the registrar's caveat were properly made and secondly, whether in the present circumstances of the matter, the registrar's caveat should remain until the final determination of the dispute between parties regarding the said land. In considering these points, the crucial question is whether or not this court has the power to direct the registrar to enter the registrar's caveat on the said land under s 320(1) of the National Land Code 1965.

Having appraised the matter and after considering the submissions of counsel and the law, I am satisfied that the ex parte order was properly made. Admittedly, I relied entirely on the affidavit of Ms Pamela Ong and no doubt on further scrutiny of Mr John Fong's affidavit, I find she had failed to make enquiries at the Land Registry regarding the ownership of the said land. I also appreciated the fact that the application was filed before the issue of any writ by which the dispute over the ownership of the said land was to be begun. In this regard, it has, however, been drawn to my attention that the writ was filed by the applicant on 13 September 1989 vide Civil Suit No 22-401-89 seeking declarations in respect of the said land. Be that as it may, I am satisfied that the ex parte application was one of great urgency and any further delay by her solicitors in filing the said application would have caused the applicant great hardship and would entail irreparable damage to her on account of an alleged fraud committed or improper dealing concerning the transfer of the said land to the respondent. Above all, I am satisfied that Ms Pamela Ong had affirmed the affidavit in utmost good faith and the fact that she had omitted to make proper enquiries at the Land Registry regarding the ownership of the said land cannot invalidate her affidavit and does not outweigh the urgency of the application. On the question whether or not the said order, which is in the nature of interlocutory mandatory injunction, should have been granted, I rely on the decision of Hoffmann J in *Films Rover International Ltd* v *Cannon Film Sales Ltd*,[4] who held that in considering whether to grant an interlocutory mandatory injunction a court was primarily concerned not with whether the injunction was mandatory or prohibitory but with whether the injustice suffered by the defendant if the injunction was granted and the plaintiff later failed at trial was greater than the injustice to the plaintiff if the injunction was not granted and he later succeeded at trial. Upon the facts and the circumstances before me, I find the risk of injustice to the applicant is greater because without the said order and if the applicant were to succeed at the trial she would not be able to get back the said land and would suffer a greater loss which would be difficult to quantify. Thus, on the balance of convenience, the said order was properly made.

I next proceed to consider the crucial question whether the registrar's caveat was properly ordered. It must first be conceded that the Registrar of Titles, Penang was never a party to this originating summons. Thus, going by the submission of Encik Ghazi, the order directing the registrar to enter the registrar's caveat could only be made if he was a party to the proceedings or at least where 'the Registrar was before the court on an allied matter' (*Seet Soh Ngoh* v *Venkateswara Sdn Bhd*[2]). In fact in *Seet Soh Ngoh*,[2] the plaintiff joined in the Registrar of Titles as a second defendant. In my opinion, notwithstanding that the Registrar of Titles is not a party to this application, the court has power to order the registrar to enter the registrar's caveat under s 417(1) of the Code which reads as follows:

> The court or a judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith.

Encik Chan referred me to the decision of Wong Kim Fatt JC in *Palaniappa Chettiar*'s case[3] where it was held that the High Court has the power under s 417(1) to order the registrar to enter the registrar's caveat under s 320 to prevent fraud or improper dealing whether or not the registrar is a party to the proceedings. Having considered the reasoned judgment of the learned judicial commissioner, I need only say that I am in complete agreement with his decision and adopt the same in this present application. However, what I need to emphasize here is simply that s 417 empowers the court to direct by order the registrar to do all such things as may be necessary to give effect to the court's order or judgment which included ordering the registrar to enter his registrar's caveat under s 320. In the instant case, after a proper scrutiny of the subsequent affidavits of Mr Bill Saw (lampiran 11) and

the applicant (lampiran 12) and the writ and the statement of claim, I am satisfied that in the circumstances of the whole case the registrar's caveat is necessary to be entered to prevent fraud or improper dealing in respect of the said land and should remain until the final determination of the dispute in Civil Suit No 22-401-89.

In the circumstances, the respondent's application must therefore be dismissed with costs which shall be costs in the cause.

Application dismissed.

[Decision of 27 December 1989 after hearing further arguments.]

On 22 December 1989, I heard further arguments of counsel under O 56 r 2(2) Rules of the High Court 1980.

After hearing counsel, I concede and hold that this court has no jurisdiction to order an injunction against the Registrar of Titles, Penang restraining him from registering any instrument of dealing in respect of the land in dispute in this originating summons. I make this order after considering s 29(2) Government Proceedings Ordinance 1956 read together with s 54(d) of the Specific Relief Act 1950. In addition, I was also referred to the decision of Ali Hassan J in *Law Kiat Long* v *Pardons Board, Johore*[5] where it was held that the court has no jurisdiction to entertain a claim for an interim injunction in view of the respective sections of the above-mentioned statutes. Thus, in the light of clear authorities, the first limb of my order given on 14 July 1989 granting an injunction against the Registrar of Titles, Penang shall now be discharged.

On the question of the entry of the registrar's caveat, Encik Ghazi submitted that on a proper reading of s 417 National Land Code 1965, the court cannot on its own volition act by ordering the registrar to enter the registrar's caveat against the said land. The registrar must first be given an opportunity to consider the application at first instance and if he refuses the registration, only then could he apply to this court under s 417. In short, Encik Ghazi's argument appears to hinge on the question of the prior order before the court could direct the registrar to do all such things as may be necessary to give effect to his order. Encik Ghazi relied on *Sungei Biak Tin Mines* v *Saw Choo Theng & Anor*[6] where the Federal Court invoked s 417 in directing the collector to delete the registration of the sub-lease in favour of the sub-lessee and instead reregister it in the name of the appellant company.

After considering Encik Ghazi's submission and the Federal Court decision in *Sungei Biak Tin Mines Ltd*,[6] I am afraid I have not been persuaded to have any second thoughts about the power of this court to direct by order the Registrar of Titles, Penang to register the registrar's caveat which I ordered on 14 July 1989 in the absence of the registrar who was not a party in this originating summons. Section 417(1) vests the power in the High Court to direct by order the registrar to carry out or give effect to any order given or made in any proceedings relating to land. I must confess that Encik Ghazi's submission has forced me to re-examine the ratio in *Seet Soh Ngoh*[2] and *Palaniappa Chettiar*.[3] However, after further consideration, I find that Wong Kim Fatt JC in *Palaniappa Chettiar*[3] at p 234 had extensively dealt with the points raised by Encik Ghazi. Short of repeating myself I would like to reiterate I respectfully concur with the learned judicial commissioner's judgment.

Therefore, for the reasons stated above, I confirm my earlier decision that in the circumstances of the whole case the registrar's caveat was necessary in order to prevent fraud or improper dealing in respect of the said land and that the application was properly made. The caveat should thus remain until the final determination of Civil Suit No 22-401-89.

No order as to costs.

Order accordingly.

Solicitors: *Lim Kean Siew & Co*; *Presgrave & Matthews*.

Reported by *Zarinah Marican*